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Internal Revenue Service
memorandum

CC:TL-N-517-90
Br2:JMorenstein

date:

JAN 12 1990

to:

District Counsel, Cincinnati
Attn: [REDACTED]

CC:CIN

from:

Assistant Chief Counsel (Tax Litigation)

CC:TL

subject:

[REDACTED]

This is in response to your memorandum of October 6, 1989, in which you requested Tax Litigation advice regarding the above named taxpayer. You requested advice as a result of a memorandum from Cincinnati Appeals dated August 17, 1989. Appeals sent its memorandum and attached a supporting statement for review and opinion regarding the possibility of defending this case in court.

ISSUES

1. Whether drivers hired by [REDACTED] ([REDACTED]) are common law employees.
2. If the workers are employees, whether [REDACTED] is entitled to relief pursuant to section 530 of the Revenue Act of 1978 under the "judicial precedent" safe haven.
3. If the workers are employees, whether [REDACTED] is entitled to relief pursuant to section 530 of the Revenue Act of 1978 under the "industry practice" safe haven.
4. If the workers are employees, whether [REDACTED] is entitled to relief pursuant to section 530 of the Revenue Act of 1978 under the "other reasonable basis" test.

CONCLUSION

1. We agree with Appeal's conclusion that the workers are employees under the common law definition of control. Despite [REDACTED]'s protest to the contrary, there is substantial evidence to demonstrate that [REDACTED] maintains a significant amount of control over its drivers. This determination is supported by the following facts: the drivers are scheduled to work at particular times, the services have to be performed personally by the driver assigned, the drivers are required to submit delivery reports and other similar indicia of employee status.

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2. [REDACTED] is not entitled to rely on the "judicial precedent" safe haven. The statute specifically allows relief based upon "technical advice with respect to the taxpayer, or a letter ruling to the taxpayer." Since the rulings relied upon were not issued to [REDACTED] they may not form the basis of a "judicial precedent" safe haven. Moreover, the statute requires reasonable reliance on the asserted safe haven in order to obtain relief under section 530. The cases which [REDACTED] cites are so dissimilar to its situation that it cannot be said that [REDACTED] reasonably relied on these cases.

3. [REDACTED] is not entitled to rely on the "industry practice" safe haven. The statute requires a "long-standing recognized practice of a significant segment of the industry in which the taxpayer was engaged." Although [REDACTED] argues the existence of a [REDACTED] delivery industry, [REDACTED] is part of the same day delivery industry. Even accepting [REDACTED]'s position, prior to [REDACTED] there were so few firms which engaged in 60 minute delivery service that it cannot be said that an industry existed. We view the purpose of this safe haven as requiring the Service to respect the industry's evolution in its treatment of workers for employment tax purposes. Any industry evolving after the passage of section 530 would be able to classify its workers as independent contractors merely to take advantage of the "industry practice" safe haven and not because of the true evolution of the practice in the industry. Thus, any "practice" of an industry arising after the enactment of section 530 is not long standing. The characterization of this industry as the same day delivery industry does not change this result.

4. [REDACTED] does not appear to be entitled to rely on the "other reasonable basis" test. In enacting the three safe havens, Congress specifically set out tests for qualifying for relief. Coming close to meeting the requirements of one or more of those safe havens, without actually doing so, cannot be a basis for relief. Moreover, other reasonable basis means reasonable basis for tax purposes. A reasonable basis grounded in general business purpose will not suffice. However, any facts that may emerge concerning the denial of a workmen's compensation claim by a former [REDACTED] driver on the grounds that the driver was not an employee could potentially affect our conclusion regarding this issue.

FACTS

[REDACTED] was incorporated in [REDACTED] and operated solely in the [REDACTED] area. Beginning in [REDACTED], [REDACTED] expanded its operations into [REDACTED] and [REDACTED]. [REDACTED] is a member of the Messenger Courier Association of America which is a division of the American Trucking Association. While [REDACTED] engages in

overnight delivery service within a [redacted] mile radius, the workers in issue are those who were hired by [redacted] to perform 60 minute delivery services in the [redacted], [redacted] and [redacted] areas.

[redacted]'s drivers receive their pick-up instructions from a dispatcher. A customer calls [redacted] and a dispatcher then calls a driver with the information regarding where the package is to be picked up and where it should be delivered. Once the driver completes the delivery, he contacts the dispatcher and notifies the dispatcher that he is available for another delivery. The drivers then fill out customer sheets which are submitted to [redacted] on a daily basis. These sheets form the basis for both the charge to the customer and the remuneration to be paid to the driver.

The drivers hired by [redacted] do not advertise their services to the general public. The drivers are required to provide their own vehicles and to pay all operating expenses relating to the operation of their vehicles. The drivers are also required to obtain insurance on their vehicles at their own expense. The vehicles used are generally small pick-up trucks.¹

[redacted] requires their drivers to paint their trucks [redacted] and pays a \$[redacted] bonus for doing so within [redacted] days. The drivers are also required to attach [redacted] to their vehicles identifying the vehicle as a [redacted] vehicle. The compensation arrangement provides the drivers with between [redacted] and [redacted] percent of the charge made to the customer. The drivers can also earn an additional \$[redacted] each day that they take trainees on their daily deliveries. The training period generally lasts [redacted] days and is specifically designed to familiarize the trainees with all of the forms that [redacted] drivers are required to prepare.

[redacted] rents uniforms and two-way radios to its drivers who "want them," although [redacted] claims that the drivers are not required to have either. Finally, [redacted] requires its drivers to wear identification badges whenever they are making deliveries. The drivers are all required to sign independent contractor agreements which, at least through [redacted], contain covenant not to compete clauses. The drivers receive no employee benefits. However, they are allowed a weekly draw against their commissions. According to [redacted], the [redacted] State Bureau of Workmen's Compensation denied a former driver's application for benefits on the basis that he was not an employee. However, [redacted] does not provide any information regarding the Bureau's basis for its determination.

¹ [redacted] also owns several large trucks which are used for making deliveries of items in excess of [redacted] pounds. [redacted] treats the drivers of these trucks as employees.

██████ alleges that, with the exception of Saturdays, the drivers are free to set their own schedules and are also free to employ assistants or substitutes. Most drivers chose to work between ██████ AM and ██████ PM since that is when the best earnings are available. ██████ also claims that they only try to schedule as many drivers as are necessary to cover the expected business on Saturdays. However, Saturday work is also voluntary.

The District Director, on the other hand, alleges that the drivers were required to work the ██████ schedule during the week and that they were also required to work on Saturdays. The affidavit of ██████ states that drivers were offered a choice of working one of three set schedules. They could work either ██████, ██████ or ██████. The District Director also alleges that the workers were threatened with dismissal if they refused to work the Saturday schedule. The District Director supported these allegations with memoranda. Other evidence, including ██████'s affidavit, indicate that drivers were required to wear the uniforms provided by ██████. A memorandum dated ██████, notes that since the day after Thanksgiving is a slow day, workers would be given the day off based upon seniority. A memorandum dated ██████, states that all drivers will be assigned a starting time and that a penalty would be charged for lateness or absenteeism.

██████'s affidavit also states that workers were required to perform services personally and could not subcontract the work out. Moreover, she states that she was affirmatively prevented from working for other companies. Finally, she adds that she had the right to quit at any time and that ██████ had the ability to fire her at any time without legal recourse.

██████ counters these allegations by stating that the memoranda did not actually reflect company policy, but, rather, were an attempt to get workers to perform better. They also attempt explanation by asserting that the author of the memoranda was dismissed since the memoranda did not comport with company policy. However, it appears that many of the memoranda were actually authored by the president and ██████ percent shareholder of ██████.

LEGAL ANALYSIS

Issue 1: Employee v. Independent Contractor

With certain limited statutory exceptions, the classification of a particular worker as an employee or an independent contractor, for employment tax purposes, must be made under the common law rules. Generally, the basis for determining whether a particular worker is an employee or an independent contractor is the common law test of control. See Treas.

Reg. §§ 31.3121(d)-1 and 31.3401(c)-1. More specifically, Treas. Reg. § 31.3401(c)-1(b) states that:

[g]enerally the relationship of employer and employee exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the worker but also as to the details and means by which that result is accomplished.

As illustrated above, the basis for determining whether a particular worker is an employee or an independent contractor is the common law test of control. Many factors are considered in evaluating whether a worker is an employee or an independent contractor and no single factor or the absence of a factor is conclusive in determining the absence or presence of control. Rev. Rul. 87-41, 1987-1 C.B. 296, sets out the 20 factors which are to be considered in making these determinations. The factors to consider are the following:

1. Instructions
2. Training
3. Integration
4. Services rendered personally
5. Hiring, supervising and paying assistants
6. Continuing relationship
7. Set hours of work
8. Full time required
9. Doing work on employer's premises
10. Order or sequence set
11. Oral or written reports
12. Payment by hour, week, month
13. Payment of business and/or traveling expenses
14. Furnishing of tools and materials
15. Significant investment
16. Realization of profit or loss
17. Working for more than one firm at a time
18. Making service available to general public
19. Right to discharge
20. Right to terminate

Each of these factors is described in some detail in the revenue ruling. We agree with the appeals officer that an application of these factors to the facts as presented in this situation leads to the conclusion that the workers were employees rather than independent contractors.

The two most compelling factors which might indicate that the workers are independent contractors are the drivers' significant investment (pick-up truck) and compensation based upon a percentage of the delivery charges. However, we do not

find these factors to be determinative. In the case of the pick-up truck, we agree that such an investment is easily distinguishable from the case of a similar investment in a "semi". First, the amount of the investment is significantly less in the case of [REDACTED]'s drivers. Second, a pick-up truck is readily usable for personal reasons as well as business reasons whereas a "semi" is more limited in its reasonable usage. Moreover, there is no indication that the drivers did not own their pick-up trucks prior to being engaged by [REDACTED].

On the other hand, there are many factors which strongly lead to the conclusion that the workers were employees. There is convincing evidence that the employees were required to work during specified hours and that they were required to perform their services personally. Both [REDACTED] and the workers had the ability to terminate their relationship at any time. [REDACTED] prohibited its workers from working for other companies and, according to [REDACTED]'s affidavit, fired a worker for doing so. We do, however, take note of the fact that [REDACTED] is a disgruntled former worker and that, to a certain extent, her affidavit may be somewhat colored. As the discussion of the employee v. independent contractor issue is well developed in the supporting statement, we do not believe it is necessary to present an exhaustive discussion herein. We agree that the overwhelming weight of the evidence requires a result that the workers in question are employees and not independent contractors.

Application of Section 530:

Section 530 of the Revenue Act of 1978 excludes from "employee" classification under the employment tax provisions individuals who were not treated as employees by the taxpayer who engaged their services. This exclusion is inapplicable if the taxpayer had no reasonable basis for not treating the individuals as employees. Section 530(a)(2) states that a reasonable basis will be deemed to exist if the taxpayer acted in reasonable reliance on any of the following:

(A) judicial precedent, published rulings, technical advice with respect to the taxpayer, or a letter ruling to the taxpayer;

(B) a past Internal Revenue Service audit of the taxpayer in which there was no assessment attributable to the treatment (for employment tax purposes) of individuals holding positions substantially similar to the position held by the individual whose status is in issue; or

(C) long-standing recognized practice of a significant segment of the industry in which such individual was engaged.

These three safe havens establish reasonable bases for not treating workers as employees. However, if the taxpayer cannot meet the requirements of any of the safe havens, it may still be entitled to relief if it can show that it had some other reasonable basis for not treating its workers as employees.

At the time section 530 was enacted, Congress considered enacting legislation which would have clarified indefinitely the employment tax status of individuals. However, section 530 was limited to periods ending before January 1, 1980. Relief was extended through December 31, 1980, by section 9(d) of the Act of December 29, 1979, Pub. L. No. 96-167, 93 Stat. 1275; through June 30, 1982, by section 1 of the Act of December 17, 1980, Pub. L. No. 96-541, 94 Stat. 3204; and indefinitely by section 269(c) of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, 96 Stat. 325, 552.

After the enactment of section 530, the Service initially decided to deemphasize employee v. independent contractor issues pending Congress' enactment of new legislation. This avoidance of unnecessary controversies meant some questionable employment tax practices went unchallenged. In fact, audits conducted by the Service which did not challenge a taxpayer's employment tax practices provided those taxpayers relief under section 530 based on the prior audit safe haven. Now with the indefinite extension of section 530, the Service is taking a more conservative approach in defining the boundaries of section 530's application. The discussion below sets out our position with regard to those boundaries.

Note that in applying section 530, it must be remembered that the statute is remedial in nature and that its legislative history indicates that the reasonable basis requirement is to be construed liberally in favor of taxpayers. See, H.R. Rep. No. 95-1748, 95th Cong., 2d Sess. (1978); Joint Comm. on Taxation, General Explanation of the Revenue Act of 1978, H.R. 13511, 95th Cong., 302 (1979); Ridgewell's, Inc. v. United States, 655 F.2d 1098 (Ct. Cl. 1981). In keeping with this remedial purpose, we have taken the position that taxpayers are not required to prove actual reliance on the asserted basis for relief. Rather, such reliance, if reasonable, will be presumed. Therefore, if the taxpayer can specifically cite to the authority that it could have relied upon, its actual reliance upon that authority will be presumed. On the other hand, citation to cases or rulings that are merely somewhat analogous will not suffice, even under the "liberally construed" language of the legislative history.

Issue 2: If the workers are employees, whether [REDACTED] is entitled to relief pursuant to section 530 of the Revenue Act of 1978 under the "judicial precedent" safe haven.

Section 530(a)(2)(A), referred to as the "judicial precedent" safe haven, grants relief to an employer that reasonably relies upon "judicial precedent, published rulings, technical advice with respect to the taxpayer, or a letter ruling to the taxpayer...."

Judicial precedent or published rulings relied upon need not relate to the taxpayer's particular business or industry. See, H.R. Rep. No. 95-1748, 95th Cong., 2d Sess. (1978). In regard to reliance upon technical advice memoranda or ruling letters, a taxpayer may only rely upon those advices or letters if it was the taxpayer to whom the ruling or letter was issued. C.D. Ulrich, Ltd. v. United States, 692 F.Supp. 1053, 1057 (D. Minn. 1988). This is consistent with section 6110(j)(3)'s general proscription against relying on written determinations. [REDACTED] relies upon LTR 7749046 which was not issued to [REDACTED]. Accordingly, [REDACTED] cannot claim relief based upon its reliance on the letter. We do note, however, that the existence of this private letter ruling may be viewed by the courts as evidence of a reasonable basis for [REDACTED]'s characterization of workers as independent contractors regardless of its ability to meet any of the three safe havens set out in the statute.

[REDACTED] also relies on Rev. Rul. 55-593, 1955-2 C.B. 610, in which truck drivers who owned large trucks were treated by their employers as independent contractors. However, as the appeals officer points out on page 29 of his supporting statement, "[t]his type of vehicle is a dedicated business asset not adaptable to personal use while a pick-up truck (like those used by the [REDACTED] drivers) does not represent a substantial investment and is also an asset that can easily be converted to personal use." We agree that this ruling is easily distinguishable from the present situation and, therefore, would feel quite comfortable recommending defense of this case based upon [REDACTED]'s reliance on this ruling.

Finally, [REDACTED] relies on the judicial precedent in Harrison v. Grey Van Lines, 331 U.S. 704 (1946), aff'g, 156 F.2d 412 (7th Cir. 1946) and United States v. Manual Trucking Company, 141 F.2d 655 (6th Cir. 1944). The supporting statement concludes that these cases hold truckers to be independent contractors based upon the same type of logic as set forth in Rev. Rul. 55-593. Our review of the relevant cases leads us to the same conclusion. As above, we agree that [REDACTED] is not entitled to relief based upon its reliance on these cases. Accordingly, for the reasons stated, [REDACTED] is not entitled to relief under the "judicial precedent" safe haven.

Issue 3: If the workers are employees, whether [REDACTED] is entitled to relief pursuant to section 530 of the Revenue Act of 1978 under the "industry practice" safe haven.

Section 530(a)(2)(C) provides relief to an employer who treated an individual as an independent contractor and who reasonably relied on a "long-standing recognized practice of a significant segment of the industry in which such individual was engaged." The term "industry" has been broadly interpreted and, in appropriate circumstances, may be determined on a local basis. The taxpayer's "industry" is made up of the businesses which compete for the same customer. For example, an automobile towing service would necessarily compete only with businesses in the local area which could be called upon on an emergency basis to quickly come and transport a vehicle. Accordingly, that industry would be confined to the local area. On the other hand, the campground industry would be made up of geographically distant businesses that advertise regionally and compete for the same customers. In every case a factual determination must be made with the emphasis being placed on the breadth of the competitive area. See, General Investment Corporation v. United States, 823 F.2d 337, 340 (9th Cir. 1989).

The ability to send packages in a short period of time is a necessary and integral part of today's business operations. Financing must often be secured before the close of a business day in order to close a deal or to facilitate the purchase of a house. These needs are not satisfied by overnight delivery services that are fast but not fast enough. However, with few exceptions, these needs can be met by companies which perform same day delivery services.

We believe that [REDACTED] is part of two industries which must be considered separately. For purposes of classifying workers performing 60 minute delivery service, we agree that it is a member of the same day delivery industry. For purposes of classifying workers performing other services, we believe that the over-night delivery service industry is separate and distinct.² Arguably, [REDACTED]'s 60 minute delivery service could be classified as part of a more specialized industry, the 60 minute delivery industry. This approach is advocated by [REDACTED].³

² It is our understanding that these workers are not in issue in this case. Therefore, we express no opinion as to their classification.

³ Classification of the industry as the 60 minute delivery industry would not effect our ultimate conclusion. We believe (continued on next page)

Industry "practice" signifies the treatment deemed appropriate by a major sector of the industry. Necessarily, it does not require absolute uniformity. Accordingly, we interpret the term "significant" to mean no less than a majority. To interpret it as requiring less than 50 percent compliance would have the effect of providing a competitive advantage to a minority of businesses in an affected industry, since the consistency requirement of section 530(a)(3) would prohibit those taxpayers who treated their workers as employees from reclassifying their workers as independent contractors. Thus, for purposes of section 530(a)(2)(C), the term "significant" will be defined as more than 50 percent. While we ultimately would prefer to use a higher percentage, we believe that the lack of judicial precedent would cause the Department of Justice to balk at a stricter requirement. As a result, our current litigating policy is to choose cases where less than a majority of the industry treats its workers as independent contractors. Moreover, in order for the taxpayer's reliance upon the industry practice to be reasonable, it is necessary to look at the status of the industry's treatment at the time that the taxpayer initiated its classification practices.

██████ was incorporated in the state of ██████ on ██████. At the time, it conducted business solely in the area in and around ██████. Schedules One, Two and Three of the supporting statement list the small package deliverers which were listed in the ██████ ██████ for ██████, ██████ and ██████, respectively. Due to the relative proximity of these three cities, we will consider all relevant businesses in these cities as being part of the industry in which ██████ competed. However, for purposes of determining ██████'s entitlement to the "industry practice" safe haven, we will only consider those businesses which were conducting business by the end of ██████.⁴

Schedule 1 of the Supporting Statement shows only one company which was conducting business by ██████ and it was treating its workers as independent contractors. Schedule 2 of the Supporting Statement also shows only one company which was

(continued from previous page)

the issue of whether the industry's practice of classifying workers as independent contractors was "long-standing" would preclude ██████ from obtaining relief under the "industry practice" safe haven. This issue is discussed more fully below.

⁴ Because the Schedules do not define what is meant by "Date of Driver Classification," we have assumed that this is the date the companies began conducting their delivery services.

conducting business by [REDACTED] and it was also treating its workers as independent contractors. Finally, Schedule 3 of the Supporting Statement lists eight companies which were conducting business by [REDACTED] of which seven treated its workers as independent contractors. In total, nine out of ten companies ([REDACTED]%) were treating their workers as independent contractors by [REDACTED]. Accordingly, were we to characterize the relevant industry as the [REDACTED] minute delivery industry, we would not recommend defending an assessment solely on the ground that [REDACTED] did not meet the "significant segment" requirement.

The Schedules also show eight additional companies which are part of the same day delivery industry and which treat their workers as employees. The dates of classification are not available. Were each of these companies to have begun operating prior to [REDACTED], the list would demonstrate an industry with only nine out of eighteen companies ([REDACTED]%) treating its workers as independent contractors. While technically not a majority, we would not recommend defending an assessment on this basis alone. However, we believe that a careful examination of the facts may lead to the conclusion that there were more companies in the same day delivery industry that treated their workers as employees. If this is the case, we would recommend defending an assessment on the "significant segment" issue as well.

The industry practice safe haven also requires the industry practice to be "long-standing". To be a "long-standing" recognized practice of the industry, we take the position that the industry must have existed prior to the enactment of section 530. Prior to the enactment of section 530, taxpayers in the various industries classified their workers as employees or independent contractors based upon their perception of the common law test of control or based upon the manner in which the rest of their industry was treating its workers. However, any industry that sprang up since the enactment of section 530 would have had the opportunity to treat its workers as independent contractors solely to get the benefit of section 530 and not because of a reasonable belief that the workers were truly independent contractors. As a result, we are not willing to accept the practice of any post-section 530 new industry as being long standing.

[REDACTED] lists 39 businesses from the [REDACTED]-[REDACTED] [REDACTED] for [REDACTED], [REDACTED], and [REDACTED]. Of these 39 only seven businesses were engaged in the [REDACTED] delivery business prior to [REDACTED]. Technically, [REDACTED] has an argument that these seven businesses made up an industry. The term "industry" is defined as "a distinct group of productive enterprises." Webster's Seventh New Collegiate Dictionary 430 (1970). However, we are not convinced that this small number of businesses is sufficient to have constituted an industry for purposes of section 530.

As you know, once a taxpayer is determined to be entitled to relief under section 530, that relief continues indefinitely unless and until the taxpayer either inconsistently treats workers holding substantially similar positions or fails to file all required returns. If an industry is determined to exist and if a significant segment of that industry has established a practice of treating its workers as independent contractors, then each and every entrant to the industry has a reasonable basis for treating its workers as independent contractors. Accordingly, if the seven businesses which offered 60 minute delivery service prior to [REDACTED] can be viewed as constituting the 60 minute delivery industry, then literally thousands of new entrants would be entitled to classify their workers based upon the treatment employed by just four of those businesses. Clearly, Congress could not have intended such a result. Accordingly, for purposes of considering section 530 relief in this case, we do not believe that seven businesses constitute an industry and, therefore, [REDACTED] is not entitled to rely on the industry practice safe haven.

As noted above, we believe that the relevant industry is the same day delivery industry. Because the Schedules do not provide the dates on which the non-60 minute delivery companies began conducting business, we do not know how many of these companies were in existence prior to [REDACTED]. However, to the extent there were more, our case becomes somewhat weaker, but our rationale and our position remain the same.

Issue 4: If the workers are employees, whether [REDACTED] is entitled to relief pursuant to section 530 of the Revenue Act of 1978 under the "other reasonable basis" test.

Section 530(a)(2) sets out the safe havens which a taxpayer may rely on in establishing that it had a reasonable basis for not treating its workers as employees and is entitled, "[s]tatutory standards providing one method of satisfying the requirements of paragraph (1)." (Emphasis added) See also, Joint Comm. on Taxation, General Explanation of the Revenue Act of 1978, H.R. 13511, 95th Cong. 302, 303 (1979). In applying the "safe haven" standards, an overriding consideration is that they are not the exclusive means for meeting the reasonable basis requirements. A taxpayer is entitled to relief under section 530 if it can show any other reasonable basis for not treating its workers as employees. Taxpayers are generally not entitled to relief based upon judicial determinations of a state court. See, O'Leary v. Social Security Board, 153 F.2d 704 (3d Cir. 1946); American Oil Co. v. Fly, 135 F.2d 491 (5th Cir. 1943). Although decided prior to the enactment of section 530, the principle that "[the Social Security Act] is not to be interrupted by the

variations and idiosyncracies in local law....", O'Leary at 707, is strong reason for not allowing relief based upon state court determinations. See also, C.D. Ulrich Ltd. v. United States, 692 F.Supp. 1053, 1056 (D.Minn. 1988).

Given an appropriate fact pattern, we might recommend concession of a case on the ground that the taxpayer could have reasonably believed that its workers were independent contractors based upon a state taxing authority's certification. However we would accept that certification only if it was based on the common law test of control. The taxpayer's reliance will not be viewed as reasonable if the state merely applies a self-certification process in determining whether workers are employees or independent contractors. [REDACTED] notes that the [REDACTED] State Bureau of Workmen's Compensation made a determination that a former driver was not entitled to workmen's compensation because he was not an employee. Since no information was provided regarding the method of the Bureau's determination, we cannot say that [REDACTED] would be entitled to relief on this basis. However, further examination of the circumstances might lead to a contrary conclusion.

A "near miss" in meeting one of the enumerated safe havens generally will not be considered a reasonable basis for treating workers as independent contractors pursuant to section 530(a)(1). Therefore, [REDACTED] is not entitled to relief on the basis that some of the businesses in its industry treated workers as independent contractors prior to [REDACTED]. Nor is [REDACTED] entitled to relief solely on the basis of the private letter ruling issued to another taxpayer. Other reasonable bases must generally be grounded in some theory other than those set out as safe havens. However, the fact these near miss situations exist should be viewed as a hazard in assessing the risks involved in litigating this case in that a court might accept them as evidence of an overall reasonable basis.

Moreover, we view the other reasonable basis test as being designed to test the reasonableness of the taxpayer's application of the common law factors or the reasonableness of its perception of other's treatment (i.e. judicial precedent or industry practice). We strongly disagree with the assessment in the Supporting Statement that concludes that reasonable basis may be based on a general business purpose. Page 31 states:

It is possible that had the taxpayer not treated the drivers as independent contractors, that they would not have been competitive within their industry and that could be construed as a reasonable basis. Further, it must be considered that if the taxpayer had not treated the drivers as independent contractors, they may not have been able to secure enough drivers for their business.

This inability to hire drivers without treating them as independent contractors could also be construed as a reasonable basis for treating the drivers as independent contractors.

It is incredible to believe that any savvy taxpayer would not be able to concoct an argument to show that treating workers as independent contractors would not serve some significant business purpose. Accordingly, while we realize the attractiveness of the argument, especially in light of the "liberally construed" language found in the legislative history, we do not believe it is tenable.

We do not believe that [REDACTED] has demonstrated any "other reasonable basis" for not treating its workers as independent contractors. The arguments it makes are largely offshoots of the enumerated safe havens for which it cannot qualify directly. Nor are we persuaded by the overall general business reasoning. Accordingly we would recommend defense of a section 530 challenge upon "other reasonable basis" grounds.

CONCLUSION AND RECOMMENDATION

While there are some factors which tend to show that the workers might have been independent contractors, there is an overwhelming amount of evidence to the contrary. Facts such as the scheduling of work hours, the requirement that services be performed personally by the driver assigned, the requirement of submitting delivery reports and the inability to work for other delivery services, are strong evidence that [REDACTED] not only had the right to control the manner in which services were performed, but, also actually exercised that control. This ability to control its workers establishes that the workers were, in fact, employees and not independent contractors. This result requires that assessments be made for the periods in issue unless [REDACTED] can demonstrate that they are entitled to relief under section 530.

Relief under section 530 is granted only if the taxpayer can show that it had a reasonable basis for not treating its workers as employees. Reasonable basis can be established by meeting one of the enumerated safe havens in section 530(a)(2) or by making a showing of some other reasonable basis.

[REDACTED] is not entitled to rely on the judicial precedent safe haven. The statute specifically allows relief based upon "technical advice with respect to the taxpayer, or a letter ruling to the taxpayer." Since the rulings relied upon were not issued to [REDACTED] they may not form the basis of a "judicial precedent" safe haven. Moreover, the statute requires reasonable reliance on the asserted safe haven in order to obtain relief under section 530. The cases and rulings which [REDACTED] cites are easily distinguishable from its situation. The fact that [REDACTED]'s

drivers use pick-up trucks or other vehicles which are easily converted to personal use, and which involve significantly less investment than workers who use trailers or "semis" is grounds alone to distinguish those cases and rulings. Accordingly, it cannot be said that [REDACTED] reasonably relied on these cases.

[REDACTED] is not entitled to rely on the "industry practice" safe haven. The statute requires a "long-standing recognized practice of a significant segment of the industry in which the taxpayer was engaged." Although [REDACTED] argues the existence of a 60 minute delivery industry, [REDACTED] is part of the same day delivery industry. Even accepting [REDACTED]'s position, prior to [REDACTED] there were so few firms which engaged in 60 minute delivery service that it cannot be said that an industry existed. Arguably, a significant segment of its industry currently treats workers as independent contractors. However, while there are a number of businesses which now participate in this industry, and while prior to [REDACTED] there were some firms which engaged in this industry, those firms were so few in number that it cannot be said that an industry existed for purposes of section 530. We view the overriding purpose of this safe haven as requiring the Service to respect the industry's evolution in its treatment of workers for employment tax purposes. Any industry evolving after the passage of section 530 would be able to classify its workers as independent contractors merely to take advantage of the "industry practice" safe haven and not because of the true evolution of the practice in the industry. Thus, any "practice" of an industry arising after the enactment of section 530 is not long standing and [REDACTED] is not entitled to relief under this safe haven.

Finally, [REDACTED] is not entitled to rely on the "other reasonable basis" test. In enacting the three aforementioned safe havens, Congress specifically set out tests for qualifying for relief. Coming close to meeting the requirements of one or more of those safe havens, without actually doing so, cannot be a basis for relief. As previously noted, however, there are hazards involved in that the courts might be willing to view these "near misses" as some evidence of a general reasonable basis. [REDACTED] also may be able to demonstrate some reliance on the Ohio State Bureau of Workmen's Compensation's determination. However, unless the Bureau engaged in a detailed examination of the 20 common law factors, we do not view this determination as a basis for relief under section 530. We also consider other reasonable basis to mean a reasonable basis for tax purposes. A reasonable basis grounded in general business purpose is too easy to contrive and, therefore, will not suffice for purposes of meeting the other reasonable basis test.

Accordingly, for the reasons stated above, we recommend that the Service proceed with making the assessments against [REDACTED] and, further, that the Service recommend defense of any subsequent refund action filed by [REDACTED] regarding this issue.

We note that, while our views may be shared with the Examination, Collection and Appeals divisions, this memorandum should not be circulated beyond your immediate office. Further, neither [REDACTED] nor its counsel should receive a copy or even be made aware that Tax Litigation Advice was requested. See CCDM (35)8(12)7.

We also note that [REDACTED] may have a right to request technical advice from the Associate Chief Counsel (Technical) pursuant to the provisions of Rev. Proc. 89-2, 1989-1 C.B. 753 or any successor revenue procedure that may be forthcoming. Since the conclusion of this memorandum is adverse to [REDACTED], we do not wish to compromise its rights should Appeals ultimately determine that an assessment for unpaid employment taxes is appropriate.

If you have any questions contact Jeffrey Orenstein of this office at FTS 566-3289.

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